No. 80-263

In the Supreme Court of the United States

OCTOBER TERM, 1979

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board held that Ithaca College ("the College") violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain collectively with the Ithaca College Faculty Association ("ICFA") as the exclusive bargaining representative of the College's full-time faculty members, and by refusing to furnish the Union with requested information necessary for the performance of the Union's duty as collective bargaining representative (Pet. App. B-11).

The Board rejected the College's contention that a unit of full-time faculty members was not appropriate because the faculty members were supervisory or managerial employees according to criteria established by the Second Circuit in *NLRB* v. *Yeshiva University*, 582 F.2d 686 (1978), aff'd, No. 78-857 (Feb. 20, 1980). The Board, adhering to its decision in an earlier representation proceeding that the College's faculty members were not managerial or supervisory employees, stated "[w]ith all due respect to the view expressed by the Second Circuit in *Yeshiva*, * * * we shall adhere to our position until the Supreme Court has passed on the matter" (Pet. App. B-5 n.3).[1] The Board denied ICFA's request for extraordinary remedies against the College (Pet. App. B-6 n.5), but nonetheless ordered the College to bargain, upon request, with ICFA (Pet. App. B-12 to B-13).

2. The College and ICFA sought review of the Board's order in the Second Circuit and the Board cross-petitioned for enforcement. While the case was pending, this Court affirmed the Second Circuit's decision in *Yeshiva* and held that the faculty members at that university were managerial personnel and thus outside the Act's protection. Slip op. 13-18. The Board thereupon requested the Second Circuit to remand the case to it for reconsideration in light of the intervening Supreme Court decision in *Yeshiva*. However, the College urged that summary judgment should be granted in its favor because the Board had failed to

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[1] The Board's decision issued on August 22, 1979 (Pet. App. B-14). On February 21, 1979, this Court granted the Board's petition for certiorari in *Yeshiva*. 440 U.S. 906.

grant its request for a hearing, made shortly after issuance of the Second Circuit's decision in *Yeshiva*. ICFA urged that the Board's order should be summarily enforced since the College had been untimely in raising the issue of managerial status.[2]

3. The Second Circuit denied ICFA's request to "enforce the Board's order as though the Supreme Court had never affirmed *Yeshiva*. It is quite obvious that *Yeshiva* is applicable and even the Board no longer seeks enforcement of its order" (Pet. App. A–10 to A–11).[3] The court also rejected the College's re-

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[2] The College did not raise the issue of managerial status until August 22, 1978, just prior to a scheduled runoff election. (The results of the first election, conducted on March 3, 1978, had proved inconclusive, and the Board's Regional Director had directed a second election.) Thus, on August 22, shortly after issuance of the Second Circuit's decision in *Yeshiva*, the College moved to reopen the record to enable it to show that its faculty were "managerial and/or supervisory personnel" (A. 3–5). The Regional Director denied the College's motion on the ground that he was bound to follow "Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals" (A. 8). On September 26, 1978, the College's request for review of the Regional Director's ruling was denied by the Board on the ground that it "raised no substantial issues warranting review" (A. 84 n.2) ("A." refers to the appendix in the court of appeals).

[3] The court found that the record belied the claim that the College's request for a hearing was untimely. The letter from the Regional Director denying the College's motion to reopen the record "made no mention of untimeliness, but rather, relied on the notion that 'Regional Directors are bound to follow and apply Board rather than Court precedent * * *.'" Moreover, "the Board is now willing to conduct a hearing" (Pet. App. A–7).

The court also held that ICFA's claim for attorneys' fees was properly rejected by the Board. "The continued claim of the

quest for summary judgment on the ground that "the Board's action in refusing to acknowledge the *Yeshiva* decision effectively precluded ICFA from presenting its case on those grounds" (Pet. App. A-11).

Nonetheless, the court refused to remand the case to the Board. It concluded that the Board had acted improperly in refusing to hold a hearing to resolve the issue of the status of the College's faculty as soon as the court's decision in *Yeshiva* had been handed down (Pet. App. A-7 to A-10). Recognizing that, though "we are empowered, we are not required to remand," and "may adjust our relief to the exigencies of the case in accordance with the equitable principles which govern judicial action," the court further concluded that "equitable factors, as well as the position of ICFA, lead us to conclude that a remand is here not appropriate" (Pet. App. A-11 to A-12).[4] Accordingly, the court

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College that the principles of *Yeshiva* be applied cannot without any show of reason be described as 'frivolous', which is essentially the Board's test in deciding whether or not counsel fees are appropriate" (Pet. App. A-11).

[4] The court explained (Pet. App. A-12):

> Here ICFA, whose interests are primarily at stake, has sought no remand, recognizes no factual issues, and in its supplemental brief filed after the Supreme Court's affirmance of *Yeshiva* and after oral argument still maintains that "the litigation in *Yeshiva* is of absolutely no import to this case." The Board had the opportunity to address the issue of faculty status and it improperly and arbitrarily refused to resolve that issue. This has exposed the College to needless expense and unwarranted prejudicial publicity. The election was close and hotly contested. The passage of time created by the Board's refusal to address these issues has undoubtedly been accompanied by changes in faculty personnel * * *.

denied enforcement of the Board's order, "without prejudice to the right of ICFA, or any other group, to file a representation petition with the Regional Office of the Board seeking to represent whatever employee group it deems appropriate within the Act as interpreted by the Supreme Court in *Yeshiva*" (Pet. App. A–12).

4. The Board believes that the Second Circuit erred in refusing to remand the case to the Board for reconsideration in light of this Court's decision in *Yeshiva*. The Second Circuit criticized the Board because it did not grant the College's request for a hearing on the status of its faculty as soon as the Second Circuit decided *Yeshiva*. However, since the Board had not acquiesced in the Second Circuit's decision and indeed was seeking review of that very decision by this Court, it was not unreasonable for it to adhere to its position in this case, pending the completion of such review proceedings.

The Board did not file its own petition for certiorari in this case because the decision of the Second Circuit rests on its assessment of the "equities" of this particular case and does not appear to present an issue of sufficient importance to be included in the limited number of cases that the government can properly ask this Court to review. However, the Board does not oppose ICFA's petition insofar as it requests this

Court to summarily vacate the order of the Second Circuit and remand the case to the Board for reconsideration in light of this Court's decision in *Yeshiva* (Pet. 25).[5]

Respectfully submitted.

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[5] The other issues presented by ICFA's petition do not warrant review by this Court. Since the Regional Director's denial of the College's request to reopen the record referred only to the fact that the Board had not acquiesced in the Second Circuit's decision and made no mention of untimeliness, and since the Board, in affirming the Regional Director and in reiterating its position in the unfair labor practice proceeding, made no mention of untimeliness, the court of appeals did not act unreasonably in concluding that the College's contentions about faculty status were timely raised. Similarly, the court of appeals correctly affirmed the Board's denial of an award of the expenses incurred by ICFA in litigating this matter, since it is the Board's policy to make such an award to charging parties only when all the issues raised in defending against unfair labor practices are "patently frivolous." *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 502 F.2d 349, 356–357 (D.C. Cir.), cert. denied, 417 U.S. 921 (1974). See *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9 (1974). The College's contentions were not patently frivolous.

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